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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

Number 2, Original.

THE STATE OF NEW MEXICO, *Complainant,*

versus

THE STATE OF TEXAS, *Respondent.*

REPLY BRIEF IN SUPPORT OF COMPLAINANT'S PETITION FOR REHEARING.

FRANK W. CLANCY,
THORNTON HARDIE,
J. HARRY COVINGTON,
On Behalf of New Mexico.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Position of Respondent on Subject of Application of Rules of Accretion to the Rio Grande Boundary.

The State of Texas in its brief in opposition to the petition for rehearing does not attempt to deny the contention of New Mexico that this Court was mistaken in announcing, in its opinion that from 1850 to 1911 the

United States and Texas had in surveying and granting lands "recognized and acquiesced in the line of the line of the river as it was located in 1850 when the Territory (of New Mexico) was created, as the boundary between the Territory and Texas, without reference to subsequent changes by accretions."

This mistaken assumption of fact was the basis of the decision of this Court in denying the applicability of the doctrine of accretion. (See Supplemental Brief of New Mexico on Petition for Rehearing, pp. 4-6.)

The true facts as shown by the record were quite the reverse of those stated on this subject by the Court. In the first place, along practically the entire boundary changes by accretion have always been recognized by Texas and the United States (See Brief, *supra*, pp. 6-14) and, secondly, the practical line which the Master found had been acquiesced in by the United States and Texas in almost its entire length coincides with the 1850 river line changed by accretions as found by him. (Brief, pp. 15-16.)

Texas in its brief in opposition to the petition for rehearing does not deny these contentions. Nor does Texas in the same brief deny the further contention of New Mexico (Brief, *supra*, pp. 17-20) that the Constitution of New Mexico, referred to by this Court, could not change the boundaries of Texas (certainly not adversely to Texas) as would be the case if the Constitution adopted the line found by this Court. This part of the opinion of this Court is bound up with the findings of fact referred to above.

The State of Texas rests its opposition to rehearing on the subject of accretion solely upon the contention that the pleadings do not raise any question of the applicability of that doctrine. This Court, in its opin-

ion, specifically refused to rest its decision on this narrow ground. We respectfully and earnestly submit that, if the pleadings be thought by this Court not properly to raise this question, both the record in this case and the rules of procedure applicable to controversies of this character should lead the Court to permit an amendment to the pleadings. In any event, so drastic a step as the decision of a boundary dispute between two States upon a point of pleading, with its resulting hardship to vested land titles, should not be taken without the fullest opportunity for the argument of this question of procedure.

The Record in This Case Makes an Amendment to the Pleadings, if Necessary, Equitable and Just.

We have already pointed out in the supplemental brief, *supra*, p. 3-4, that in December, 1923, the official interpretation placed upon the pleadings by the Attorney General of Texas was that the parties were agreed that the ordinary doctrine of accretion was applicable. This was also the view taken by the Special Master. (See Report, p. 79.) Prior to April 14, 1924, the State of New Mexico filed a motion to take certain additional testimony, the nature of which was set out in an affidavit attached to and made a part of the motion. (See Record, Additional Testimony, pp. 1-5.) This testimony, as appears from the affidavit, was to prove that certain alterations in the course of the river were "by gradual changes through accretion and not by avulsive changes." No objection to this motion was filed by the State of Texas.

On April 14, 1924, this Court granted the motion "limited to the subject matter detailed in his affidavits, dated November 26, 1923, and filed with the

motion," and this Court granted the State of Texas the right to introduce rebuttal testimony. (Record, Additional Testimony, p. 5.)

On May 5, 1924, the additional testimony permitted by this Court was taken and no objection was made by the State of Texas that the pleadings were not sufficient to admit proof on this issue. The only objection made by the State of Texas appears on page 14 of the Transcript of Additional Testimony as follows:

> "Q. 60. Mr. Owen, from your examinations, on the ground, in past years, and your present surveys up there, are you able to state whether or not the river changed, from its position in 1852, as shown on this map, by avulsion or accretion?
>
> Mr. W. W. Turney: Do not answer yet. We want to make this objection to that question, and any answer to it. That it has not been shown, as yet, that the river claimed to be the river of 1925, at the point indicated, and adjacent to the country club district, actually came from the river of 1852, or the location of the river of 1852, either by avulsion, or accretion; and, second, the witness has not qualified as an expert on the question of avulsion or accretion. It is plain that the witness did not see the changes in the river, from his testimony now given, and that heretofore given; and, to ask the witness to give an expert opinion as to the character of change, when he has not been qualified as an expert on these points, would not be proper; and we object to the testimony being given, and if given, we will move to strike it out; and we may make further objection to it."

(It should be pointed out that Mr. W. W. Turney was of counsel for Texas from the inception of this litigation.)

No objection was thereafter made during the taking of this testimony as to the insufficiency of the pleadings to admit proof of accretion. Thereafter, beginning June 19, 1924, the State of Texas introduced testimony on the question of accretion. (See Record of Additional Testimony, pp. 67-124.)

By special order this Court instructed the Special Master to receive a brief from the *amicus curiae* which would necessarily deal solely with the question of accretion.

This was the state of the record when the parties closed their proof and submitted the case to the Special Master. The first objection raised by the State of Texas that the pleadings were not sufficient to admit proof of accretive changes appears in the Exceptions of the State of Texas to the Report of the Special Master, filed in this Court on December 21, 1926. If this objection had been raised at any prior time it is clear that this Court would certainly have allowed an amendment to the pleadings in order that they might conform to the proof on the subject of accretion which the complainant took under a specific order of this Court. No objection, however, was raised until the case was closed and was before this Court on exceptions from the report of the Special Master. Both parties treated the pleadings as sufficient to admit all necessary proof required to determine the true boundary line.

It should also be pointed out that this Court in its opinion recognized that the general rule is that changes by gradual accretion on a river boundary between two states change the interstate boundary and that this is altered only by a long continued practice to the contrary. No such long continued practice was set up in

any pleading appearing in this case. If, therefore, the pleadings are too narrow to permit proof of changes by accretion, they would also seem to be too narrow to permit proof of a long continued practice which alone causes an exception to the general rules of accretion.

In any event, we respectfully submit that under the facts of this case the Court should, if it considers the pleadings inadequate to permit it to determine questions as to changes in the 1850 river line by accretion, permit an amendment to the pleadings under which it can consider the proof heretofore taken under its express order.

The Rules of Procedure in Original Cases Permit Such an Amendment to the Pleadings.

In the case of *Virginia v. West Virginia,* 234 U. S. 117, this Court permitted the filing of additional pleadings after the opinion of the Court on the merits of the case had been announced. In that case this Court said on page 121:

> "The question then is, Under these conditions ought the permission to file the supplemental answer be granted? We think it must be conceded that in a case between ordinary litigants the application of the ordinary rules of legal procedure would render it impossible, under the circumstances which we have stated, to grant the request. We are of the opinion, however, that such concession ought not to be here controlling. As we have pointed out, in acting in this case from first to last the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between states, involving grave questions of public law, determinable by this court

under the exceptional grant of power conferred upon it by the Constitution, has been the guide by which every step and every conclusion hitherto expressed has been controlled. And we are of the opinion that this guiding principle should not now be lost sight of, to the end that when the case comes ultimately to be finally and irrevocably disposed of, as come ultimately it must, in the absence of agreement between the parties, there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice, after the amplest opportunity to be heard, has in any degree entered into the disposition of the case. This conclusion, which we think is required by the duty owed to the moving state, also in our opinion operates no injustice to the opposing state, since it but affords an additional opportunity to guard against the possibility of error, and thus reach the result most consonant with the honor and dignity of both parties to the controversy."

We, therefore, respectfully submit that the petition for rehearing be granted, and that the State of New Mexico be given an opportunity to amend its pleadings so that there may not be "the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy or that anything but the largest justice, after the amplest opportunity to be heard has in any degree entered into the disposition of the case."

Respectfully submitted,

FRANK W. CLANCY,
THORNTON HARDIE,
J. HARRY COVINGTON,
On Behalf of New Mexico.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 2 Original

THE STATE OF NEW MEXICO, *Complainant,*
v.
THE STATE OF TEXAS, *Respondent*

BRIEF ON BEHALF OF THE EL PASO COMMERCIAL COMPANY, FRED FREEMAN, HEMLY & RISHABERGER AND MRS. C. A. KERBER, AS AMICI CURIAE, IN SUPPORT OF COMPLAINANT'S PETITION FOR REHEARING.

STATEMENT

This brief is filed in support of complainant's petition for rehearing on behalf of the El Paso Commercial Company, Fred Freeman, Hemly & Rishaberger and Mrs. C. A. Kerber, as owners of land lying south of the 32d parallel and north of the south line of the Canutillo Grant and being located west of the Salazar-Diaz river line (determined by this Court to be the boundary) and east of the line of the Texas surveys, which the Special Master has found to be the 1850 river line with accretions. These titles are based on

patents issued by the State of Texas. Taxes on this land have been paid to the State of Texas for many years and it is in a high state of cultivation.

As under the decision of this Court this land is held to be within the boundaries of New Mexico it will be readily seen that upon the granting or refusal of the petition for rehearing depends whether the owners of such land have good title to the same or those titles are absolutely void.

REPORT OF SPECIAL MASTER

The Special Master divides the patents issued by the State of Texas into three groups. These parties are concerned with the two groups lying between the 32d parallel and the south line of the Canutillo Grant.

With reference to this land the Special Master reports as follows (pp. 48-50):

> (1) The patents for lands lying between the 32d parallel and the north line of the Canutillo Grant, and extending south from that parallel a little over six miles. Most of these patents were issued between 1860 and 1873, and were based on Surveys made in the years from 1849 to 1873 (with the exception of the Marsh Survey made in 1881, and the Groesbeck Survey)—the Surveys being numbered 161, 162, 54, 281, 35, 34, 163 to 172, inclusive. The Maverick Surveys 161 and 162 (made by Anson Mills) were immediately south of the 32d parallel and were bounded on the west by the Rio Grande as it flowed in 1860. South of these were Surveys 35 and 34, with their western boundary on the Rio Grande as it flowed in 1849. South of Surveys 35 and 34 there were the Maverick Surveys 163, 164, 165, 166, 167, 168, 169, 170, 171, 172 (made by Anson Mills), extending south-

erly in the order name (except 172, which was to the west of the others and bordering on the Rio Grande as it flowed in 1860). I find that within this latter group of Maverick Surveys, in 1858, their owner intended to include all the vacant land between Survey 34 and the Canutillo Grant, and to have a 'frontage on the Rio Grande.' (1) I find that the locations of Surveys 165 to 172, inclusive, can be now fixed, since in the resurvey of the Canutillo Grant by John P. Randolph, in 1886, the original southwest corner of Survey 171 was found and identified and its distance measured east to the railroad track. Consequently, I find that all of said surveys were in the river valley and west of the railroad. On the plaintiff's contention as to location of the river and of Clark's Monument No. 1, it would appear that a large part of all of the above surveys would be located in the sandhills above the river valley.

(2) The patent for the Canutillo Grant. This was a patent for land extending in a north and south direction between four and five miles, its northern boundary extending over one-third across the valley to the west (about a mile and a half) and with its southern boundary extending over two miles, practically the whole width of the valley. This land was a Mexican grant made in 1823; it was surveyed by Anson Mills in 1860, being Survey No. 173. (1) It was resurveyed by John P. Randolph and a patent was issued by the State of Texas, in 1886. The boundaries (except possibly the river boundary) contained in this patent can be substantially identified on the ground. It is certain that by far the greater part of the land patented was, in fact, located west of the location of the river claimed by New Mexico. Much evidence was introduced by the plaintiff to sustain its contention that the surveys, both by Mills and by Randolph, were incorrect and not in accord with

the boundaries set forth in the original Mexican grant. I find this evidence to be irrelevant, inasmuch as the surveys, whether they were or were not incorrect, did, in fact, lay claim to land in the valley bounded on the west by the Rio Grande as shown on the maps made by Mills and Randolph introduced in evidence by the plaintiff. It is possible that these surveys laid claim not only to all the land east of the river as contended for by the State of Texas but also to land lying west of the Rio Grande; and the plaintiff has introduced evidence to that effect. (1) But even if this were true, it would not alter the fact that the surveys did lay claim to the land as far west as the Rio Grande as it ran at the dates of the surveys. The question whether the surveys and the patent conformed to the original grant is only matter of controversy between the State of Texas and its patentee or other private claimants, and has no bearing upon the issue as to whether, in fact, the patent was issued for the land described and acted upon by the patentee accordingly.

Further on in his report (p. 54) he says:

On the above evidence (but without consideration of the Maps last above referred to), I find that, for at least thirty years while New Mexico was a Territory and prior to its admission as a State, the United States made no challenge of the claims to lands asserted by the State of Texas and by its citizens through surveys, patents, and locations, and that it, impliedly, at least, recognized the practical line that had been established as the boundary between the Territory and the State, so far as this line lay in the Rio Grande.

FINDINGS OF FACT OF SPECIAL MASTER

The Special Master finds as a fact:

1. That the true boundary line between the State of Texas and the State of New Mexico is the line of the Rio Grande River as established at the time the various surveys were made and patents issued.

2. That this line was tacitly recognized by the State of Texas and by the Federal Government during the period that New Mexico was a territory.

In this connection it is significant to note that the supplemental brief filed on behalf of New Mexico as well as the principal brief filed on behalf of Texas agree that the doctrine of accretion should apply in fixing this boundary.

DECISION OF THE COURT

This Court rendered its opinion on December 5, 1927, and decided as follows:

1. That the location of the Rio Grande as it flowed in 1850 from the parallel of 32 degrees north latitude to the International Boundary between the United States and Mexico was as found by the Special Master and substantially as contended for by the State of Texas.

2. That the Special Master erred in applying the recognized rules of accretion to the Rio Grande, so located, in determining the boundary line because the Court believed that the United States and Texas, before New Mexico became a State, had recognized as the boundary the river of 1850 without regard to changes by accretion.

CONCLUSION

Applying the above findings to the situation in which these parties find themselves, the Master's report determines that their property is situated within the State of Texas according to the boundary line recognized by the State of Texas and the United States for sixty years, but the Court in its decision has held that this property is situated within the limits of the State of New Mexico.

It is respectfully submitted that under either finding of fact by the Special Master the true boundary line is that determined by the Special Master and that a rehearing should be granted in this case in order that the decision may coincide with his findings.

The result of the decision of this Court is to invalidate all patents issued either by Mexico or the State of Texas to the land lying between these two lines. In the case of these parties it will result in a portion of their property being declared to be public land of the State of New Mexico and thrown open for acquisition in accordance with the laws of that state, regardless of any vested rights the present owners may have under what up to the present time had been regarded by the State of Texas and the United States as valid grants.

Respectfully submitted,

ARTHUR HELLEN,

On behalf of the El Paso Commercial Company, Fred Freeman, Hemly & Rishaberger, and Mrs. C. A. Kerber.